S T A T E O F M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of **TELNET WORLDWIDE, INC.,** for arbitration of interconnection rates, terms, and conditions and related arrangements with **VERIZON NORTH INC.** and **CONTEL OF THE SOUTH, INC., d/b/a VERIZON NORTH SYSTEMS**.	)	Case No. U-13931

At the October 14, 2004 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On October 24, 2003, TelNet Worldwide, Inc. (TelNet), filed a petition seeking arbitration of an interconnection agreement with Verizon North Incorporated and Contel of the South, Inc., d/b/a Verizon North Systems (Verizon), pursuant to the federal Telecommunications Act of 1996, 47 USC 251 et seq. (FTA).

Thereafter, the parties continued negotiations and ultimately stipulated that the date of first request for negotiations should be deemed to be January 19, 2004, with the date of filing and service of the petition on Verizon to be June 2, 2004, which the parties stipulated is the 135th day. On June 4, 2004, TelNet filed an amended petition for arbitration, which eliminated issues that the parties had settled, and added 18 issues related to certain Federal Communication Commission (FCC) proceedings, detailed below.

On June 9, 2004, Verizon filed an amended answer. The parties agreed to retain John Kern of Kern & Associates to act as the arbitration panel, review the record, and develop an arbitration panel decision.

It appears that many events have delayed the progress of this case, including continuing negotiations and the proceedings involving the FCC's issuance of its Triennial Review Order (TRO)[1] and the subsequent partial reversal and vacating of the TRO in United States Telecom Assoc v FCC, 359 F3d 554 (CADC, 2004) (USTA II); cert den sub nom Nat'l Assn of Regulatory Utility Commrs v FCC, ____ SCt ____. The District Court stayed the effect of its decision until June 15, 2004. On June 16, 2004, the District Court's mandate issued. Thereafter, on August 20, 2004, the FCC issued Order FCC 04-179[2] (interim order), in which the FCC required incumbent local exchange carriers (ILECs) to continue providing certain unbundled network elements (UNEs) pursuant to the terms and conditions applicable on June 15, 2004, or to a state commission order that has or will affect those rates, for an interim period lasting six months from the date that the order is published in the Federal Register. Those elements required to be provided under that order include switching, enterprise market loops, and dedicated transport. The interim order further provides a transition period in which it dictates permissible rate increases for those elements.

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[1]Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, issued August 21, 2003, effective October 2, 2003.

[2]Order and Notice of Proposed Rulemaking in WC Docket No. 04-313, Unbundled Access to Network Elements, and CC Docket No. 01-338, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers.

TelNet filed a Proposed Decision of the Arbitration Panel (PDAP) on July 23, 2004, with a supplement concerning the TRO on July 30, 2004. On August 3, 2004, TelNet filed a second supplement to its PDAP concerning issues it inadvertently omitted from its original PDAP. On August 18, 2004, Verizon filed its PDAP for all issues except those addressed in TelNet's August 3, 2004 filing. Verizon addressed the remaining issues in a PDAP filed August 25, 2004.

The arbitration panel heard oral presentations on August 19, 2004 and held a conference call with the parties on September 1, 2004.

On September 8, 2004, the arbitration panel issued its 187-page Decision of the Arbitration Panel (DAP). On September 20, 2004 TelNet and Verizon filed their respective objections to the DAP. On September 30, 2004, Verizon filed a motion for leave to file reply exceptions. On October 1, 2004, TelNet filed an answer to that motion. On October 7, 2004, Verizon filed a response to TelNet's answer. The arbitration procedures and schedule permit only the filing of objections to the DAP. The Commission has not considered documents filed after the simultaneous objections to the DAP.

II.

DISCUSSION

TelNet's Objections

A. Network Architecture

According to TelNet, Issues 34 and 45(A) relate to the architecture with which Verizon and TelNet interconnect. TelNet explains that currently the parties' networks do not touch, and that traffic between them is transited using SBC Michigan's (SBC's) network, for which the appropriate party pays SBC. However, it states that traffic has now increased to the point that the parties are considering whether to install the facilities to directly connect their networks. TelNet argues that one party could decide that it would be economical to create a direct connect, while the other might choose otherwise. This could be accommodated with a one-way direct trunk.

TelNet argues that before a rational economic determination can be made, a determination concerning the allocation of costs for direct connection must be made. TelNet argues that the arbitrator's decision will create rules that will inhibit TelNet, and other competitive local exchange carriers (CLECs) that might adopt the interconnection agreement, from direct interconnection. It argues that whether TelNet is the sole party financially responsible for bridging the gap between the parties' networks is the heart of these issues. It argues that its proposed language is a verbatim copy of language that the FCC's Wireline Competition Bureau approved in arbitrating an interconnection agreement between Verizon Virginia and AT&T.

The Commission finds that the arbitration panel's decision on this issue should be upheld. The arbitration panel addressed all of the arguments raised in a succinct and correct fashion. Therefore, the Commission rejects TelNet's objections to this issue.

B. Separate Trunks and Trunk Utilization

TelNet argues that Issue 45(D) is integrally related to the network architecture issue discussed above. Therefore, TelNet states, if the Commission affirms the arbitration panel's determination concerning the network architecture, TelNet's position on this issue must be rejected.

The Commission has determined that the arbitration panel's determination concerning the network architecture should be affirmed. Therefore, the Commission also accepts TelNet's position that it would not object on this issue.

C. Direct Trunking to Verizon End Offices

1. Establishing New Trunking

TelNet states that Issue 45(E) relates to whether TelNet should be required to establish two-way trunk groups to carry traffic from the point of interconnection (POI) on Verizon's network to each of Verizon's end offices when traffic on Verizon's side of the POI exceeds the DS-1 level. TelNet again states that this issue is integrally related to the first issue discussed above. If the Commission affirms the arbitration panel's determination concerning the first issue, TelNet states that it would not object to this issue.

The Commission has already determined that it should adopt the arbitration panel's determination regarding TelNet's first objection. The Commission accepts TelNet's non-objection to this issue.

2. Limit on Interconnection Trunks

TelNet argues that the arbitration panel erroneously put the burden on TelNet to prove why limiting the number of interconnection trunks between a POI on Verizon's network and a Verizon tandem to 240 trunks would be burdensome. It argues that pursuant to Section 251(c)(2) of the FTA, 47 USC 251(c)(2), the ILEC should have the burden to prove that establishing more than 240 trunks between a POI and Verizon's tandem would be technically infeasible. TelNet argues that Verizon only claimed that there are increasing demands made upon it to provide interconnection. TelNet states that this is an industry-wide issue and is not a proper basis for Verizon to unilaterally impose this limit on TelNet.

TelNet argues that the proposed limit of 240 trunks is totally arbitrary and without any substantive support in this case. It argues that approving the 240-trunk limit would impede competition.

TelNet further objects to the reasoning of the arbitration panel, which TelNet says, rests on the panel's determination that this limit is imposed on other CLECs with which Verizon does business and is part of Verizon's model contract. TelNet argues that the fact that some CLECs have opted to take the model contract rather than engage in extensive contract negotiations or arbitration proceedings does not equate to precedent supporting the adoption of Verizon's proposed language. It argues that Verizon has not pointed to one case in which the Commission has adopted this limit on trunks.

The Commission finds that this portion of the arbitration decision should be modified to adopt TelNet's language. The Commission has consistently rejected proposed limits on the number of trunks to a tandem. See, e.g. the Commission's August 17, 1999 order in Case No. U-11973 and the September 14, 1999 order in Case No. U-11989. The Commission is not persuaded that its position must be altered on this issue. Therefore, the Commission concludes that the decision of the arbitration panel should be reversed on this issue and the language proposed by TelNet should be adopted.

D. <u>Dedicated Transport</u>

TelNet proposed language that would permit it to interconnect with Verizon's network using UNE dedicated transport, if it is required to be made available by federal law. Verizon argued that the FCC had ruled in the TRO that ILECs were not required to unbundle transmission facilities that connect ILEC networks to CLEC networks for the purpose of backhauling traffic. The arbitration panel determined that pursuant to the TRO, there is no current obligation for Verizon to provide unbundled dedicated transport outside of its own network. Therefore, it adopted Verizon's proposed language.

TelNet objects and argues that its proposed language permits TelNet to interconnect with Verizon using unbundled dedicated transport only if it is available pursuant to applicable federal law. Moreover, TelNet argues, the issue of whether the FCC correctly defined dedicated transport has been remanded to the FCC in USTA II. TelNet argues that on remand, the FCC issued an interim order that requires that "between the effective date of this Order and the effective date of the permanent unbundling rules that the [FCC] plans to issue before the close of 2004, incumbent LECs shall continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004." Interim Order, 21.[3] In TelNet's view, the interim order provides a window of opportunity for it to continue to purchase dedicated transport as a UNE for purposes of interconnection. It argues that Verizon's proposed language removes this option.

The Commission is persuaded that it should adopt TelNet's language for this issue. TelNet should be permitted to purchase dedicated transport pursuant to the terms of the FCC's interim order.

E. Multiplexing

TelNet proposed language to avoid the problems that it has experienced with SBC concerning the collection of charges for multiplexing and cross-connects from the ILEC. Verizon argued that there should be a prohibition against charging for multiplexing for a number of reasons, including: (1) there is likely to be symmetry in the necessity to multiplex; (2) there is no cap on the CLEC's charge for such services, and (3), reciprocal compensation rates should cover all costs associated

[3]FCC 04-179, Order and Notice of Proposed Rulemaking, In the matter of Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No, 01-338, rel'd August 20, 2004.

with the exchange of traffic. The arbitration panel found that Verizon's position should be adopted.

TelNet objects and argues, among other things, that the arbitration panel's decision does not incorporate Verizon's language as it was modified by its answer to the petition for arbitration, which deleted the terms "any multiplexing, cross connects, or other" from Section 7.1, which previously read:

> No additional charges shall be assessed by the terminating party for the transport and termination of such traffic from the technically feasible points(s) of Interconnection on Verizon's network in a LATA to its Customer; provided, however, for the avoidance of any doubt, TelNet shall also pay Verizon at the rates set forth in the Pricing Attachment, for any multiplexing, cross connects or other Collocation related Services that TelNet obtains from Verizon.

The Commission finds that the arbitrator's decision on this issue should be adopted for the reasons stated in the DAP, with the understanding that the language adopted is the latest language proposed by Verizon. The Commission does not find TelNet's arguments to the contrary persuasive.

F. Cross-Connection with other Collocated CLECs

TelNet proposed language that would permit it to install its own cross-connects to other CLECs also collocated at a given Verizon premises. Verizon proposed language that would limit installation of those cross-connects to Verizon's installation and equipment. The arbitration panel determined that Verizon's position was most compatible with current federal law and should be adopted.

TelNet objects and argues that although federal law does not require that Verizon permit a CLEC to self-install cross-connects to other collocating CLECs, the Commission should, pursuant to its state authority, reverse the arbitration panel's determination and adopt TelNet's proposed language. TelNet argues that its language is more supportive of competition, because Verizon would require CLECs that desire a cross-connection to "go through tedious procedures before Verizon would agree to provide cross-connection." TelNet Objections, p. 46.

The Commission finds that the conclusion of the arbitration panel should be adopted for the reasons stated in the DAP. Although certain state authority is preserved by the FTA, the Commission must exercise its authority in a manner consistent with the FTA, under both the federal statute and the Michigan Telecommunications Act, MCL 484.2101 et seq. (MTA). The Commission finds that to adopt TelNet's proposed language would not be consistent with the FTA and the applicable case law, which even TelNet admits does not require the ILEC to accept TelNet's proposed language.

G. Liability for Failure to Perform

In Issues 89B and 90, the parties disputed whether TelNet should be permitted to recover costs from Verizon if Verizon fails to complete a properly submitted work order for UNE or UNE combinations, and, if so, whether the charges TelNet proposes are reasonable. Verizon and the arbitration panel grouped these issues with Issues 94, 121, and 122, which concern timeframes within which Verizon must provide certain services.

TelNet objects to both (1) the grouping of these issues together, and (2) the arbitration panel's determination that Verizon's proposed language should be adopted because it reflects an industry-wide consensus concerning performance measures. TelNet argues that the arbitration panel's discussion centered on the proposed performance standards and did not directly address TelNet's argument that it should be compensated when Verizon misses confirmed due dates. It argues that if Verizon does not meet the due date to which it has committed, then TelNet may not be able to perform as it agreed with its customers, thus tarnishing the CLEC's reputation. It argues that a liquidated damages clause is a reasonable method for compensating TelNet for such losses.

The Commission is persuaded that TelNet should be permitted to recover its proposed liquidated damages, although the Commission is not persuaded that the performance standards (the time for performance) should be altered from that adopted by the arbitration panel. However, the Commission finds that the liquidated damages provision proposed by TelNet is a reasonable method to compensate the CLEC for losses that are difficult to measure, such as reputation with its customers.

H. Non-recurring and Recurring Charges for Certain Services

TelNet objects to the arbitration panel's determination that Verizon may impose charges for which TelNet asserts Verizon has not provided adequate cost study support. TelNet argues that either there is no evidence that these add-on charges are derived from the cost study, or there is no evidence that these miscellaneous charges are not already subsumed in the charges for the general service offering with which they are associated.

Specifically, TelNet objects to Verizon's proposed charges for loop conditioning, reporting new conversion time, rescheduling, trouble isolation, and a retag fee. TelNet states that its current interconnection agreement contains no charges for the activities at issue. Moreover, Telnet asserts, these charges have not been previously approved by the Commission.

TelNet argues that despite the long negotiation process, in which TelNet has challenged the lack of support for these charges, Verizon has done nothing to demonstrate that the charges are cost-based and not included within its charges for the service as a whole. TelNet further argues that for Issues 97, 98, 105, and 160, the arbitration panel did not accept TelNet's proposal based on his finding that an arbitration proceeding is not an appropriate forum to determine costs. The arbitration panel recommended that the Commission adopt Verizon's charges as interim rates, pending the outcome of Verizon's then pending cost proceeding in Cases Nos. U-13944 and U-14013.

The Commission finds that TelNet's position should be adopted on these issues. In the Commission's September 21, 2004 order in Cases Nos. U-13944 and U-14013, the Commission granted motions to dismiss those cases. Verizon joined in the request for dismissal. Therefore, there is no current pending cost case. Rather, the parties to those proceedings believed that further cost proceedings should not take place until the FCC issues final rules concerning unbundling obligations and pricing.

The fact that the current TelNet interconnection agreement does not have charges for these services leads the Commission to believe that the costs for the services are recovered through the applicable approved charges for these services. Verizon is not permitted to unilaterally establish its own charges for items that must be provided at cost-based rates.

I. Dark Fiber

Issue 108 concerns whether the interconnection agreement should include limitations on TelNet's access to dark fiber loops and subloops. TelNet proposed language for the interconnection agreement, stating simply: "Verizon shall impose no limitations on TelNet's access to dark fiber unless permitted to do so by Applicable Law."

Verizon proposed language that would impose various restrictions upon TelNet's use of dark fiber. Verizon pointed out that as a result of the TRO and the order vacating portions of the TRO, Verizon is no longer required to provide access to dark fiber. Verizon's proposed Section 3.2.5 of the TRO Amendment establishes the procedures under which the changes in unbundling obligations will be implemented.

The arbitration panel determined that Verizon's language should be adopted. In so doing, the arbitration panel determined that the TRO does not require Verizon to provide dark fiber subloops. In the arbitration panel's opinion, the reference to hybrid loops in the TRO applies in the limited circumstance in which a CLEC cannot otherwise obtain a complete transmission path over time division multiplexing networks, in order to provide broadband capabilities over hybrid DS1 and DS3 loops. The arbitration panel stated that TelNet's argument that Verizon must provide access to all dark fiber loops bears no relationship to ¶¶289-290 of the TRO.

TelNet objects and argues that the arbitration panel relied on only portions of the TRO, but ignored the difference in the FCC's treatment of broadband versus narrow band services. It argues that the TRO requires Verizon to provide feeder fiber when it is a component of a path, replacing the traditional copper loop, between the central office and the end-user. Moreover, TelNet argues, the TRO generally permits access to the fiber feeder plant as a part of the transmission facility between the central office and an end-user, with a narrowly carved exception for packetized capability.

Further, TelNet objects to inclusion of additional definitions for dark fiber and dark fiber subloops. It further argues that Verizon cited no authority for its desire to require TelNet to establish a demarcation point on the customer premises at a distance of no more than 30 feet from Verizon's accessible terminal on which the dark fiber loop or dark fiber subloop terminates. In fact, TelNet argues, 47 CFR 51.319(b)(3) establishes that ILECs have "the burden of proof of demonstrating to the state commission, in state proceedings under section 22 of the Act, that there is no sufficient space available, or that it is not technically feasible to unbundled the subloop at the point requested." TelNet Objections, pp. 60-61. TelNet argues that the Commission should adopt

TelNet's language, which guarantees both parties that dark fiber loops and subloops will be provided only as provided by law, but also to the full extent available under current law.

The Commission is not persuaded that TelNet's proposed language should be adopted for purposes of this interconnection agreement. The TRO found that CLECs are impaired without access to dark fiber. That finding was vacated by the D.C. Circuit in USTA II. On August 20, 2004, the FCC issued the interim order in which it created interim rules to replace those vacated by USTA II. Those interim rules provide an interim and transition period as described in that order for access to loops. The Commission finds that the transitional access described in the FCC's interim order should be included in the interconnection agreement, as more fully discussed later in this order.[4] In all other respects, the Commission adopts the reasoning and result of the arbitration panel on this issue.

J. Virtual NXX

In the arbitration panel's view, the resolution of Issues 32, 33, 40, 41, and 47 is dependent upon the Commission's long-held policy that local calls include virtual NXX calls.[5] TelNet says that the arbitration panel rejected Verizon's request to reverse the Commission's policy, but recommended that the Commission determine if new circumstances warrant a change in Commission policy on these issues. TelNet objects to this recommendation and argues that no new circumstances warrant a reversal of the Commission's long-standing policy in Michigan.

[4]This issue is related to an objection raised by Verizon concerning the transition period described in the FCC's August 20 order for high-capacity loops, dedicated transport, and dark fiber.

[5]Virtual NXX calls refer to calls that may be terminated outside the geographic area that is associated with the first three numbers of the seven-digit telephone number (the NXX), but is treated as a local call.

In its objections to the DAP, on the other hand, Verizon commends the arbitration panel for recommending that the Commission change its position with respect to Virtual NXX calling. It argues that the Commission has not considered the issue since 2001, and has never considered the arguments and evidence presented in this case, which should compel the Commission to reach a different outcome.

Verizon argues that Virtual NXX traffic should be exempt from the requirements for reciprocal compensation under the exceptions provided in 47 USC 251(g) and 47 CFR 51.701(b)(1), because those calls constitute "exchange services for . . . access." It states that Section 251(g) provides that "exchange access, information access, and exchange services for such access" remain subject to the access charge regime that pre-dates the FTA. Although the Commission has previously found that Virtual NXX calls are not exchange access calls, Verizon argues that the Commission has not ruled upon whether they employ "exchange services for such access."

Verizon argues that the FCC has defined "exchange services for . . . access" as "the provision of services in connection with interexchange communications. Verizon argues that because "a [Virtual] NXX call is indisputably an 'interexchange communication,' and Verizon MI provides a service in connection with that interexchange communication whenever it allows TelNet access to Verizon's network so that TelNet can provide VNXX service to its customers,"[6] these calls should be found exempt from the reciprocal compensation provisions of the FTA.

Further, Verizon argues, the Commission's previous finding that Virtual NXX traffic is not exchange access is not correct. It argues that the Commission based that finding on the fact that a separate charge is not charged to the calling customer for those calls. It argues that the existence of a separate toll charge is not the touchstone of whether a call involves exchange access. It

[6] Verizon's Objections, p. 7.

argues that many carriers now offer customers unlimited long distance calls without paying an additional charge beyond the flat rate. But despite this lack of a separate charge, the terminating carrier may not impose reciprocal compensation charges on what is otherwise a long distance call. Thus, Verizon argues, the Commission may not lawfully hold that reciprocal compensation applies to Virtual NXX calls.

Verizon adds that permitting TelNet to collect reciprocal compensation for this traffic will have anti-competitive effects that the FCC has condemned. It states that a provider of Virtual NXX would rarely if ever pay reciprocal compensation, but would be receiving it for terminating the Virtual NXX traffic. It argues that the FCC found that permitting such an imbalance in compensation might allow a CLEC to offer service to its customers at rates that bear little relationship to its actual costs, thereby gaining an advantage over its competitor. According to Verizon, the FCC's ISP Remand Order[7] says:

> "[G]iven the opportunity, carriers always will prefer to recover their costs from other carriers rather than their own end-users in order to gain competitive advantage. Thus, carriers have every incentive to compete, not on the basis of quality and efficiency, but on the basis of their ability to shift costs to other carriers, a troubling distortion that prevents market forces from distributing limited investment resources to their most efficient uses."

ISP Remand Order, ¶68.

Verizon goes on to say that the retail rating of a call is, or should be, irrelevant to determining the appropriate intercarrier compensation. It further states that the majority of states to address this issue (21 states) have concluded that Virtual NXX traffic should not be subject to reciprocal compensation. In fact, Verizon states, the Illinois state commission, which issued an order upon

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[7]Order on Remand and Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, 16 FCC Rcd 9151 (2001), rem'd sub nom WorldCom, Inc, v FCC, 288 F3d 429 (CADC, 2002), cert den sub nom Core Communications, Inc v FCC, 538 US 1012 (2003).

which the Commission relied when it made its first determination concerning Virtual NXX calls, has specifically reversed itself in a decision it issued in July, 2002.[8] Further, Verizon argues, many of these states have found that intrastate access charges should apply to these interexchange communications.

The Commission is persuaded that it should adopt the decision of the arbitration panel for the reasons stated in the DAP. The Commission finds that Verizon's arguments are not persuasive to change long-standing Commission precedent on this issue. The only binding authority cited by Verizon was also available, cited, and discussed by the Commission in the last order in which the Commission held that Virtual NXX traffic should be treated as local calling for purposes of reciprocal compensation. See, the Commission's September 7, 2001 order in Case No. U-12952, pp. 24-25. Consequently, the Commission adopts the language proposed by TelNet on these issues.

Based on the Commission's finding on this issue, the Commission also rejects Verizon's arguments in its second objection to the DAP that Virtual NXX traffic to ISPs must be found ineligible for transitional compensation established in the ISP Remand Order.

K. Trouble Tickets

Issue 91 raises the question as to whether Verizon must credit TelNet for Verizon's trouble isolation charges and pay TelNet a trouble isolation charge when Verizon determines in error that TelNet is the cause of a trouble ticket and TelNet subsequently finds that the trouble is in Verizon's network. Although the arbitration panel determined this issue in favor of TelNet, the

[8] July 24, 2002 order in Essex Telcom, Inc v Gallatin River Communications, LLC, Docket No. 01-0427, 2002 Ill PUC LEXIS 703.

CLEC objects to a comment made in the DAP that the issue might be moot. TelNet declares that the issue is not moot, and the adoption of TelNet's language should be affirmed.

In Verizon's objections, on the other hand, it challenges the arbitration panel's determinations on this issue. It argues that TelNet proposes to credit back charges that Verizon would not impose, and to charge undisclosed amounts for costs incurred to determine that the trouble is not on TelNet's network. It argues that TelNet's proposed language is not necessary and would lead to unjustified results.

The Commission finds that the arbitration panel's determination that TelNet's proposed language should be adopted for the interconnection agreement should be affirmed. The Commission agrees that if Verizon's network is causing the trouble for which the ticket is issued, TelNet should not be responsible for the costs of reaffirming that its network is not the source of the problem. However, the parties should agree on language that would limit any credit to TelNet to the amount of charges Verizon has actually imposed for its investigation. If Verizon has not imposed a charge, there should be no credit back to TelNet for later finding that the trouble lies with Verizon's network.

L. Unbundled Feeder Subloop

TelNet proposed to alter Verizon's proposed language for UNE Attachment, §6.2.2. Verizon argued that § 6.2.2 should be deleted from the interconnection agreement. The arbitration panel agreed with Verizon.

TelNet does not dispute that the section can be deleted, but it objects to the rationale for the arbitration panel's decision. The Commission finds that it is the appropriateness of the resulting language that is important, not a dispute concerning the rationale. The Commission does not agree with TelNet's arguments concerning its reading of the TRO. The Commission neither adopts nor strikes the second rationale employed by the arbitrator. The disputed language should not appear in the interconnection agreement.

M. Resale Non-Recurring Charges (NRCs)

Verizon proposed to impose certain NRCs on TelNet for resale services. TelNet objected and argued that the only permissible wholesale charge for resale services is the retail charge that Verizon would impose on its own end-user customer for that service, less the wholesale discount determined in Verizon's latest cost case, Case No. U-11832. TelNet further objected to Verizon's proposal to impose charges that had not been approved by the Commission in a previous cost case.

The arbitration panel determined that the language proposed by TelNet "as modified by the Panel" should be adopted. However, TelNet states, there does not appear to be any modification to TelNet's language. It seeks clarification of the arbitrator's modification, if any. TelNet further objects to any modification to its language as being unnecessary. It again asserts that charges unsupported by an approved cost study may not be imposed. Moreover, it argues, the only appropriate wholesale charge for resold service is the retail charge less the applicable discount.

The Commission finds that TelNet's language should be adopted without modification. The only appropriate wholesale charge for resale service is the retail charge for the same service, less the discount established in Case No. U-11832. Any separately developed charges for ordering and installation must be removed.

Verizon's Objections

A. Reciprocal Compensation for Voice Information Services

Issue 43 concerns whether Verizon must pay TelNet reciprocal compensation for "voice information service" traffic. As explained by the arbitration panel, voice information services consist of recorded voice announcement information and vocal discussion programs open to the public (such as 976 chat services). TelNet cited the Commission's determination on information services traffic in the August 18, 2003 order in Case No. U-13758, an arbitration proceeding involving SBC Michigan and MCImetro Access Transmission Company, as support for its position that reciprocal compensation is due for this traffic. Verizon argued that 47 CFR 51.701(b)(1) exempts information services from the reciprocal compensation requirements of 47 USC 251.

The arbitration panel concluded that TelNet's position and contract language should be adopted for Issue 43, consistent with the Commission's conclusions in Case No. U-13758.

Verizon objects to the arbitration panel's determination that voice information services traffic should be subject to reciprocal compensation. It argues that the arbitration panel made no independent determination on this issue, but rather, felt compelled to reach that determination based on Commission precedent. Verizon argues that the Commission should not rely on its prior rulings to resolve this issue, but should look only at the record of this proceeding.

Verizon argues that 47 USC 251(g) exempts traffic destined for voice information services providers from reciprocal compensation obligations. It argues that the cited section exempts from reciprocal compensation traffic bound for any information service provider, not just Internet service providers (ISPs). It states that, because the voice-based information services at issue are indisputably information services under the FTA and industry practice, they are ineligible for reciprocal compensation.

The Commission is persuaded that the decision of the arbitration panel should be adopted on this issue, consistent with the Commission's August 18, 2003 order in Case No. U-13758. The Commission notes that the ISP Remand Order was remanded back to the FCC in WorldCom v

FCC, 288 F3d 429 (CADC, 2002), in which the United States Court of Appeals for the District of Columbia Circuit found that §251(g) of the FTA does not authorize the FCC to exempt all information services from the reciprocal compensation requirements of §251(b)(5). Verizon cites nothing after that date that would support finding all information services exempt from reciprocal compensation. Thus, the Commission is not persuaded that it must alter the conclusion reached in Case No. U-13758.

B. Assignment of Third-Party Contracts

In Issues 67 and 68, the parties disputed whether Verizon may prohibit the assignment or assumption of its customer service arrangements (CSAs) with its end-users, and whether a CSA should bind TelNet or the customer if Verizon cannot produce a copy of the contract. TelNet argued that its proposed language was based upon a provision that the Commission approved in Case No. U-12382, which was an arbitration between what is now SBC Michigan and Coast to Coast Telecommunications, Inc. Verizon took the position that CSAs have nothing to do with interconnection requirements under the FTA and are unrelated to the parties' relationship under §§251 and 252 of the FTA. It argued that TelNet should not be permitted to dictate the terms of separate agreements between Verizon and its end-user customers. It further argued that the Commission's decision in Case No. U-12382 should not be considered precedent on this issue because Verizon does not intend to assign its CSAs to any CLEC.

The arbitration panel found that the language proposed by TelNet should be adopted for these issues. In so doing, it cited the Commission's determination that the assignment of CSAs relates to terms and conditions of resale services under §251. Further, the arbitration panel determined that it is reasonable for TelNet to obtain a copy of a valid CSA from Verizon within 10 days of its request so that it may determine what obligations it might be undertaking. In sum, the arbitration panel determined that Verizon's arguments did not persuade the arbitration panel to recommend that the Commission alter its position on this issue.

Verizon objects to these determinations and argues that the Commission should reverse them. It argues that the decision in Case No. U-12382 was based on an entirely and materially different factual scenario from that at issue here. It argues that in the prior proceeding SBC agreed to the assignment of its third-party contracts, whereas Verizon does not agree to assign that type of contract. Verizon argues that its proposal is reasonable and consistent with federal law, while TelNet's proposal is not.

Verizon argues that the Commission may not prohibit Verizon from including non-assumption or non-assignment clauses in its third party contracts.

The Commission finds that the arbitration panel's determination on this issue should be affirmed for the reasons stated in the DAP. Verizon's contracts to serve customers are retail services, which are subject to wholesale for resale provisions of 47 USC 252. The Commission is not persuaded to a different result based on Verizon's claim that the record in Case No. U-12382 varies significantly and materially from the present one.

The DAP does not state whether the proposed language requires Verizon to produce the contract within 10 calendar or 10 business days. The Commission finds that requiring Verizon to produce a copy of the contract within 10 business days is a reasonable requirement for the interconnection agreement.

C. High-Capacity Loops, Dedicated Transport, and Dark Fiber

The panel determined that Verizon's ability to cease providing high-capacity loops, dedicated transport, and dark fiber should be subject to a transition period mutually agreed upon by the parties, at some point in the future. Failing agreement, the arbitration panel stated that the parties should seek resolution from the Commission.

Verizon objects to the arbitration panel's determinations concerning the Revised TRO Amendment, and argues that it is contrary to the transition period set out in the FCC's interim order, issued following USTA II. Verizon states that the Commission is bound to resolve the issues presented according to the federal law as it stands on the date of decision, and cannot adopt the arbitration panel's determination. Further, Verizon argues, the Commission should adopt Verizon's language, which provides that if the FCC's interim order is vacated, TelNet would have a minimum notice of 90 days before Verizon would cease providing these UNEs. In any event, Verizon states, the period through which TelNet may access these UNEs would last at least until the FCC's transition period expires, or if the FCC fails to issue an impairment finding within the time stated in the interim order.

The Commission is not persuaded that Verizon's proposal should be adopted. It is clear from the FCC's interim order that TelNet may access these UNEs under the terms and conditions available to it on June 15, 2004. The period for which those terms and conditions are effective lasts until March 13, 2005, or until the FCC issues new unbundling rules, whichever occurs first. Once the interim period closes, a transitional period begins in which incumbents may cease taking new UNE orders for these elements, but must continue providing competitors with access to existing arrangements, although at higher prices prescribed in the order. The transition period also lasts for six months, after which the incumbent may cease providing as UNEs any elements for which the FCC has found no impairment or has failed to issue unbundling rules. The FCC indicated that parties and state commissions should encourage a speedy transition to the new rules. However, the present case is one that is not likely to cause an issue with the speed of recognizing and implementing new rules, whenever they may be issued. The Commission is persuaded that this interconnection agreement should provide for TelNet to have access to these UNEs according to the terms of the FCC's interim order. The parties should be able to negotiate reasonable terms and conditions for the provision of these elements for the period following the transition period provided in that order. If the parties are unable or unwilling to agree, Verizon should be permitted to cease providing them on a minimum of 90 days' notice to TelNet. As the arbitration panel noted, there may be elements for which 90 days would be insufficient notice before Verizon ceases providing the elements. The parties should be permitted to draft language that accomplishes these purposes to be filed as a part of filing their interconnection agreement in compliance with this order. Any remaining dispute should be brought to the Commission's attention.

D. Certification Requirements for Enhanced Extended Loops (EELs)

Issue 158 contained three sub-issues, the first of which the arbitration panel determined to be moot, because they relate to existing EELs and TelNet does not currently purchase EELs from Verizon. In fact, Verizon stated that no CLEC purchases EELs in Michigan. The arbitration panel therefore found that Verizon's proposed language for the other two sub-issues need not be incorporated into the agreement, because it appears unlikely that TelNet will purchase EELs.

Verizon objects to the arbitration panel's determination with regard only to the third sub-issue, which addresses the manner in which TelNet certifies that it is in compliance with the TRO's qualification for ordering EELs. Verizon proposes that TelNet provide detailed information listed in the quote below concerning the lines for which it seeks to obtain EELs at the time of ordering. Verizon argues that the Commission should adopt Verizon's proposed provisions setting forth the certification criteria. Verizon's proposed language requires that TelNet provide at the time of ordering:

> For each DS1 circuit or DS1 equivalent: (a) the local number assigned to each DS1 circuit or DS1 equivalent; (b) the local numbers assigned to each DS3 circuit (must have 28 local numbers assigned to it); (c) the date each circuit was established in the 911/E911 database; (d) the collocation termination connecting facility assignment for each circuit, showing that the collocation arrangement was established pursuant to 47 USC 251(c)(6), and not under a federal collocation tariff; (e) the interconnection trunk circuit identification number that serves each DS1 Circuit. There must be one such identification number per every 24 DS1 circuits; and (f) the local switch that serves each DS1 circuit.

Verizon Objections, p. 53.

Verizon asserts that each of listed pieces of information precisely tracks the six requirements that the FCC established in the TRO.

The Commission finds that the language proposed by Verizon goes well beyond permissible requirements for certification in the TRO. The FCC stated that a CLEC may certify that it meets the qualification by letter.[9] The FCC acknowledged that in certain cases, a CLEC would not have a number before ordering an EEL, and indicated that its certification that service would not begin until a number was established would be sufficient. Moreover, the FCC did not require that the CLEC list the number information when ordering the EEL. In fact, the FCC stated: "A critical component of nondiscriminatory access is preventing the imposition of any undue gating mechanisms that could delay the initiation of the ordering or conversion process."[10] The Commission finds that TelNet should be permitted to self-certify its compliance with the criteria listed in the TRO, without all of the detail that Verizon's proposed Section 4.4.2.2 would require. Thus, the Commission finds that TelNet's proposed language for self-certification should be adopted.

[9]TRO, ¶624.

[10]TRO, ¶ 623.

E. Challenge to EELs Audit Findings

Issue 161 involves TelNet's demand that it have the opportunity to challenge a negative finding upon audit of its EELs for compliance with the criteria of the TRO. Verizon argued that TelNet should have no right to review of the auditor's findings, because the FCC's TRO did not provide for such challenges. The arbitration panel determined that TelNet's position should be adopted on this issue.

Verizon objects and argues that if the Commission does not reverse the arbitration panel's determination on Issue 158, it should not adopt the DAP's determination on this issue. It argues that the arbitration panel was inconsistent in its determination that the Commission should withhold judgment on whether Verizon has interpreted the requirements for certification correctly, but finds that the agreement should include language implementing the certification rules. The Commission has already made a finding that Verizon's proposed certification contents go well beyond the provisions of the TRO for certification. The Commission finds that the arbitration panel's resolution of this issue should be adopted for the reasons articulately stated in the DAP.

F. Appropriate Rates

Verizon states that on a large number of issues, the arbitration panel correctly rejected TelNet's attempts to supplant Verizon's permanent rates. The arbitration panel found that an arbitration case is not an appropriate forum for determining Verizon's costs. The arbitration panel therefore left all rate questions for future Commission decision in a generic cost case affecting all CLECs. However, Verizon objects to the arbitration panel's determination that the rates should be left for a future generic proceeding. It argues that this effectively renders Verizon's rates interim rates until a new cost case is completed.

The Commission finds that there is no pending cost case for Verizon. Therefore, this issue need not be discussed at length. It is sufficient to reiterate that Verizon may only charge its approved cost-based rates pursuant to this interconnection agreement. Any rate that was not approved by the Commission may not be imposed on TelNet. There is no reason to leave to a new cost case the rates for this interconnection agreement. The normal rules for setting rates will apply.

G. Application of the Resale Discount

The FTA provides that Verizon, as an ILEC, must make services available to TelNet that it provides at retail to subscribers who are not telecommunications carriers at wholesale rates. 47 USC 251(c)(4). Wholesale rates are determined by reducing the retail rate by the costs avoided in the wholesale environment. 47 USC 251(d)(3). In the present case, Verizon proposed to impose certain NRCs on TelNet's purchase of resale services. TelNet objected to charges other than those determined by the normal retail rate minus avoided cost method. The arbitration panel found in TelNet's favor on this issue. Verizon objects.

Verizon argues that a CLEC must pay two sets of charges for services that it seeks to resell. It contends that in addition to paying for the retail service itself (i.e., the retail rate minus avoided costs), TelNet must also pay several NRCs that permit Verizon to recover costs associated with processing the CLEC's resale orders and otherwise serving the CLEC. These NRCs, Verizon argues, are set at total element long run incremental cost. It asserts that this pricing structure is found in almost all of Verizon's interconnection agreements.

Verizon argues that the arbitration panel made two erroneous changes to Verizon's proposed resale charges. First, Verizon argues, the arbitration panel's determination to strike all of the NRCs leaves Verizon with no vehicle to recover costs it incurs to process and provision TelNet's orders. Second, Verizon argues, the arbitration panel determined that these NRCs are subject to the avoided cost discount, despite the fact that Verizon asserted these charges are for work performed for TelNet, not for retail customers.

Verizon argues that the statute provides that only services that the incumbent provides at retail to subscribers, not to telecommunications carriers, are subject to the retail rate with the avoided cost discount. But, Verizon argues, the order processing and provisioning services that Verizon provides to TelNet are not provided at retail to subscribers. Therefore, Verizon asserts, the avoided cost discount pricing method does not make sense for these purely wholesale services.

Verizon argues that the arbitration panel inappropriately relied upon the Commission's February 25, 1998 order in Case No. U-11281. Verizon contends that the cited decision is so abbreviated that it is impossible to discern what has been decided. It argues that the Commission never decided the question of whether Verizon may impose NRCs for services that are not provided to retail subscribers, which it argues is the issue in this case. In short, Verizon asserts, there are no FCC or Commission decisions that hold ILECs must apply the resale discount to all costs incurred in providing resold service to CLECs.

The Commission finds that the arbitration panel's decision is correctly reasoned and should be upheld on these issues. The arbitration panel rightly found that the Commission has already ruled on this issue in Case No. U-11281 and Case No. U-11832. The sole charges permissible for resale services are those that are charged to retail customers less the avoided cost discount. In cases where Verizon charges its retail customers an NRC for the retail service, it may impose that charge, less the avoided cost discount, on TelNet. However, if Verizon does not charge its retail customer an NRC for the service, it may not impose an NRC on the CLEC. The authorized avoided cost discount takes into consideration the costs that Verizon incurs to provide the service.

For example, processing an order, whether for retail service or for wholesale service, is processing an order. Verizon does not have the right to recover those costs twice by imposing another order processing charge. Therefore, NRCs that have no retail counterpart must be removed. NRCs that do have a retail counterpart may be charged less the avoided cost discount.

H. Clarifications

1. Limits on Back Billing

The arbitration panel determined that TelNet's proposal to limit the period within which the parties' may submit their billing statements to each other to12 months should be adopted. Although Verizon says that it does not agree with that decision, it is not contesting it. Rather, Verizon argues that the Commission should require clarification that the limitation does not apply when the back billing is necessary because of fraud or misconduct by the party to whom the bill is submitted or by any related third party. It argues that such a limit is clearly reasonable and consistent with the principle that fraudulent conduct preventing a party from discovering a claim will not prevent the claim from being actionable, even if the statute of limitations period has passed. Thus, Verizon requests that the Commission adopt the following clarifying language:

> It is the intent of both parties to submit timely statements of charges. Upon request by either party, the parties shall participate in good faith negotiations to establish bill closure procedures unless, at the time of such request, an industry forum has been established to address such requested bill closure, in which event each of the parties shall participate in such forum. In no event, however, may a statement be presented to the other party more than twelve (12) months after the date the charges are incurred, unless such back-billing is necessitated by the fraud or other misconduct of the billed party or a related third party.

The Commission concludes that language reflecting that fraudulent conduct may extend the time limits for a party to submit a bill to the other party should be included in the interconnection agreement. However, the Commission is not prepared to approve the language proffered by

Verizon, without TelNet having an opportunity to negotiate the specific language to be used. The Commission finds, therefore, that the parties should work to agree on language covering this point and include it in the interconnection agreement that will be submitted in compliance with this order. If the parties are unable to agree, each party should submit its last best offer to the Commission for language that will implement the result the Commission reaches. The Commission will then choose from between the two.

2. Use of UNEs to Serve Another Carrier

Issue 28 concerns the definition of a customer proposed by TelNet. The arbitration panel determined that TelNet's language should be adopted for purposes of the interconnection agreement. Verizon states that it does not take issue with that decision, although it disagrees with it. However, Verizon argues that the interconnection agreement should include language clarifying that TelNet may provide service to other carriers only to the extent that is permitted by applicable law. Verizon argues that its proposed addition is intended to make clear to TelNet and any other carrier that might opt into the agreement that it does not give the CLEC a right to provide UNEs in a manner contrary to federal law.

The Commission finds that the lack of such "clarifying language" cannot be the basis for any carrier to assume that the contract permits unlawful acts. Generally, contracts that purport to permit unlawful acts would be found unenforceable. Moreover, the TRO Amendment language that Verizon quotes as unchallenged by TelNet makes it clear that UNEs may only be used by TelNet for purposes consistent with Verizon's obligations under 47 USC 251(c)(3) and 47 CFR Part 51. However, to avoid any possible future dispute, the Commission is not opposed to adding the requested phrase "only to the extent permitted under applicable law" within Section 2.25 of the Glossary.

3. Collocation Terms and Conditions

In Issue 69, Verizon says, the arbitration panel ruled that the parties should incorporate Verizon's current collocation tariff into the interconnection agreement in full, rather than by reference. Further, Verizon states, the arbitration panel found that TelNet will not be permitted to mix and match terms for a particular collocation order. Verizon states that in order to ensure that the contract language reflects the arbitration panel's intent to prevent arbitrage, the Commission should clarify that TelNet may not mix and match terms with respect to a particular collocation arrangement.

The Commission agrees with Verizon that TelNet may not mix and match terms and conditions within a particular collocation arrangement request. It must either order from the tariff or the interconnection agreement, which at the beginning of the agreement will be the same thing.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.

b. The DAP, as modified by this order, should be adopted, and the parties should submit a conforming interconnection agreement within 60 days of the date of this order.

THEREFORE, IT IS ORDERED that, within 60 days of the date of this order, the parties shall submit a fully executed interconnection agreement that conforms with the findings in the Decision of the Arbitration Panel, as modified by this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chair

(S E A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of October 14, 2004.

/s/ Mary Jo Kunkle
Its Executive Secretary

THEREFORE, IT IS ORDERED that, within 60 days of the date of this order, the parties shall submit a fully executed interconnection agreement that conforms with the findings in the Decision of the Arbitration Panel, as modified by this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

Chair

Commissioner

Commissioner

By its action of October 14, 2004.

Its Executive Secretary

In the matter of the application of **TELNET WORLDWIDE, INC.,** for arbitration of interconnection rates, terms, and conditions and related arrangements with **VERIZON NORTH INC.** and **CONTEL OF THE SOUTH, INC., d/b/a VERIZON NORTH SYSTEMS**.	)))))))	Case No. U-13931

Suggested Minute:

> "Adopt and issue order dated October 14, 2004 directing the parties to file within 60 days, a fully executed interconnection agreement conforming to the decision of the arbitration panel as modified by this order, as set forth in the order."